United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

lcmt

75-4191

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

FRANCISCO ANTONIO SUAREZ-CASTRO,

Petitioner,

- v - : Docket No. 75-4191

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

B
P/S

PETITIONER'S BRIEF

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STATEMENT OF THE CASE

Petitioner Francisco Antonio Suarez-Castro ("Suarez") is a native and citizen of the Dominican Republic. In October, 1973 (R.22a) petitioner admitted before an Immigration Judge that he was deportable and was given a period through October 29, 1974 within which to voluntarily depart.

In January, 1975, Suarez submitted an application for political asylum (R. 9a-12a) supported by an affidavit (R.13a-21a).

The respondent District Director of the Immigration and Naturalization Service ("I.N.S.") did not consider this application at all R.8a. He relied on his disposition of a similar application which Suarez had made in 1972 without taking into account the events that had occurred between 1972 and 1975. Suarez' 1975 application was not referred to the Department of State as required by the regulation, 8 C,F.R. 108.2. Instead, relying on Suarez' so-called "deliberate choice and withdrawal of the 243(h) application in exchange for a protracted period of voluntary departure from the United

States" which is said to have occurred at the 1972 deportation hearing, the Immigration Judge denied 243(h) relief on June 11, 1975 (R.2a-4a) upon his consideration of Suarez' motion to reopen the 1972 deportation hearing.

The Board of Immigration Appeals dismissed an appeal (R.1a) from the decision of the Immigration Judge and this petition for review followed.

STATUTES AND REGULATIONS INVOLVED

The case involves the construction of Sec.243(h) of the Immigration and Nationality Act and of the Regulation thereunder, 8 C.F.R. Part 108, both of which are set forth in the addendum.

POINT I

RES JUDICATA IS NOT APPLICABLE TO A REQUEST FOR ASYLUM WHERE A PREVIOUS DECISION WAS NOT ENTERED ON THE MERITS

At the initial deportation hearing, petitioner, after negotiations on the record with the government, agreed to dismiss his request for Section 243(h) relief, Immigration and Nationality Act of 1952 ('the Act'), if the Service would grant sufficient time to process his visa on alternative grounds. See Chairman's Opinion (Appendix R2a).

As a result of this understanding, Petitioner was led to believe that sufficient time would be given to process his case, the terms of the order, one year voluntary departure notwithstanding. The government and counsel for Petitioner were both aware that in the event processing was not concluded within the initial period, extensions would be available through administrative channels separate and apart from the jurisdiction of the Immigration Judge. Both parties further understood that processing in the Dominican Republic was naturally undesirable due to the petitioner's fear of persecution. Under existing law, petitioner was required to return to his native country to secure his visa interview as well as issuance ofhis visa. Hence, petitioner was required to seek a different visa issuing post which endeavor found success in Newfoundland.

Given this background, petitioner argues that the District Director abused his discretion by not giving the petitioner a full opportunity to present his case. Since earlier proceedings had not resulted in a final administrative determination on Petitioner's request for 243(h) relief, of the Act, (persecution fear), the basis of decision by the District Director was manifest error where the basis relied on was the earlier determination.

POINT II

RES JUDICATA IS NOT APPLICABLE WHERE TWO DIFFERENT APPLICATIONS ARE MADE, DECISION ON THE MERITS OF THE FIRST APPLICATION NOTWITHSTANDING

If the decision of the Immigration Judge were viewed as a final administrative decision on the merits of the section 243(h) (of the Act) application, then the reliance by the District Director on this adjudication was improper, since the application to the District Director was for political asylum and not witholding of deportation pursuant to Section 243(h) of the Act.

POINT III

RES JUDICATA IS NOT APPLICABLE WHERE EACH AND EVERY APPLICATION IS SUI GENERIS; TO DO OTHERWISE IS AN ABUSE OF DISCRETION IN THE DUE PROCESS SENSE SINCE IT DENIES PETITIONER A FULL OPPORTUNITY TO PRESENT HIS CASE

In a decision letter by the District Director, dated March 17, 1975, the Petitioner's asylum request was denied (See Appendix 8-a).

The basis for Decision was that inasmuch as the Service had considered and denied a request in 1972, no further steps would be taken.

Petitioner contends that as a matter of law, the District Director's basis for denial was an abuse of discretion.

Apparently the District Director viewed the request for Asylum as a Matter of Res Judicata. Hence, he seems to have considered himself estopped from considering petitioner's affidavit in support of his request for Asylum, dated January 29, 1975 (R.13a)

The subject to which a request for asylum addresses itself is one to which the principle of Res Judicata is manifestly inappropriate. The asylum request is 'sui generis'. Each request must be considered

on its own facts or at the very last cumulated with the history of the applicant.

To do otherwise is to ignore the very nature of the problem. New facts may have superseding intervening significance with respect to the applicant. The ever-changing relevant political climate within the applicant's native country lends to the subject matter a special characteristic which must free the request from traditional notions of Res Judicata.

Due Process in this connection has been regarded as requiring that the applicant be given a reasonable opportunity to present his proofs and to have them considered. Nam Kung v. Boyd 226 F.2d 385 (9th Cir. 1955)

The standards employed by the Attorney General in exercising his discretion under s243(h) of the Act are subject to judicial review. Sovich v. Esperdy 319 F.2d 21, 26 (2nd Cir. 1963).

An administrative decision based upon erroneous legal standards cannot stand. SEC v. Chenery Corp., 318 U.S. 80. 94, 63 S.Ct. 454, 87 L Ed. 626 (1943).

See also Soric v. Immigration & Naturalization Service 346 F.2d 360, 361 (7th Cir. 1965), vacated on other grounds, 382 U.S. 785, 86 S. Ct. 432, 15 L.Ed. 330 (1965).

In Paschalidis v. District Director 143 F. Supp 310 (S.D.N.Y. 1956), the court found that full opportunity to present additional evidence had been denied when the applicant had been denied a short adjournment to produce additional witnesses.

The Board of Immigration Appeals did not consid[illegible] these issues in the case-at-bar since the Board is without jurisdiction to consider constitutional claims. To present the Board of Immigration Appeals with the question is futile and hence makes the remedy inadequate.

In summation, Petitioner contends that the procedural basis of decision by the District Director was Due Process error, in that he denied petitioner a full opportunity to present his request. Nam Kung v. Boyd (See supra) and Paschalidis v. District Director, (See supra).

Therefore, petitioner requests that this Court reverse and remand the Board of Immigration Appeals' decision to the District Director to consider the evidence previously submitted and, in addition, to further consider any new evidence the petitioner may wish to submit since the last request.

CONCLUSION

For the foregoing reasons, the petition for review should be granted.

Respectfully Submitted,

S. Bernard Schwarz, Esq.

Antonio C. Martinez
Attorney for Petitioner
by
S. Bernard Schwarz,
of counsel.

STATUTES AND REGULATIONS INVOLVED

Immigration and Nationality Act of 1952,

8 U.S.C.

Sec. 106(a) (4) of the Act provides, in

pertinent part:

> "the Attorney General's findings of fact if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive".

Withholding of deportation

Section 243(h)

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

8 C.F.R. 108 - ASYLUM

Sec. 108.1 Application

An application for asylum by an alien who is seeking admission to the United States at a land border port or preclearance station shall be referred to the nearest American Consul. An application for asylum by any other alien who is within the United States or who is applying for admission to the United States at an airport or seaport of entry shall be submitted on Form I-589 to the district director having jurisdiction over his place of residence in the United States or over the port of entry. The applicant's accompanying spouse and unmarried children under the age of 18 years may be included in the application.

Sec. 108.2 - Decision

The applicant shall appear in person before an immigration officer prior to adjudication of the application, except that the personal appearance of any children included in the application may be waived by the district director. The district director shall request the views of the Department of State before making his decision unless in his opinion the application is clearly meritorious or clearly lacking in substance. The district director may approve or deny the application in the exercise of discretion. The district director's decision shall be in writing, and no appeal shall lie therefrom. If an application is denied for the reason that it is clearly lacking in substance, notification shall be given to the Department of State, with opportunity to supply a statement containing matter favorable to the application, and departure shall not be enforced until 30 days following the date of notification. A case shall be certified to the regional commissioner for final decision if the Department of State has made a favorable statement, but, notwithstanding, the district director has chosen to deny the application. If any decision will be based in whole or in part upon a statement furnished by the Department of State, the statement shall be made a part of the record of preceeding, and the applicant shall have an opportunity for inspection, explanation, and rebuttal thereof as prescribed in §103.2(b)(2) of this chapter. A denial under this part shall not preclude the alien, in a subsequent expulsion hearing, from applying for the benefits of section 243(h) of the Act and of Articles 32 and 33 of the Convention Relating to the Status of Refugees.

Thomas J. Cahill (PZ)

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January 29, 1976

UNITED STATES ATTORNEY